JOURNAL OF ANTI-CORRUPTION LAW

2024 Volume 8 Pages 41 - 59

CATCHING THE SLIPPERY FISH: WILL LIFESTYLE AUDITS NET THE CORRUPT IN UGANDA?

Zakaria Tiberindwa*

ABSTRACT

Uganda is one of the African countries that has embraced lifestyle audits as a tool against corruption in the public service. In November 2021, the Inspector General of Government announced that the Inspectorate of Government would subject public officials to lifestyle audits as a means to fight corruption in government. There is evidence that when lifestyle audits are effectively implemented, they can be a viable anti-graft mechanism. Yet, resource limitations as well as other legal and policy constraints may complicate the implementation of lifestyle audits. Moreover, their constitutional legitimacy may be contested due to the intrusion on the privacy rights of individuals who are subjected to such audits. Also, the shifting of the burden of proof to those implicated to explain any disparities in their wealth and sources of income may infer a negation of the presumption of innocence. Furthermore, there have also been suggestions that they may encourage arbitrary deprivations of property. In Uganda, there has been scanty academic discourse on the likely legal and policy challenges that may constrain the effective implementation of lifestyle audits to counter corruption. This paper therefore seeks to discuss some of the legal and policy limitations that may constrain the implementation of lifestyle audits in Uganda and make suggestions on how some of the limitations can be overcome in the circumstances. The paper reviews various laws, policies and jurisprudence regarding lifestyle audits, as well as books and articles on the subject.

* LLM Criminal Justice University of the Western Cape, Inspectorate of Government, Uganda, ztiberindwa@gmail.com.

1. WHAT ARE LIFESTYLE AUDITS? AN INTRODUCTION

Corruption is a historically prevalent problem in the majority of societies and continues to be a global challenge.[1] Estimates of the global annual cost of corruption are at US$ 2.6 trillion which translates to approximately 5 per cent of the global Gross Domestic Product (GDP).[2] Moreover, it is highly probable that the global corruption cost is grossly underestimated with some of the more significant costs considered to be incommensurable.[3] In Uganda, the corruption problem has been persistent.[4] In October 2021, a few months following her appointment as the Inspector General of Government, Betty Kamya revealed that national annual estimates of funds lost to corruption were at UGX 20 trillion which is approximately almost half the annual budget of the country.[5] She was equally concerned with Uganda's unfavourable rankings in the Corruption Perception Index.[6]

As one of the measures to counter the corruption problem, she indicated that her office was set to use lifestyle audits to catch "the big fish",[7] who she described as "slippery" and capable of hiding their wealth.[8] She further indicated that the so-called "big fish" were taking advantage of the constitutional protections afforded to accused persons to escape culpability for their corrupt actions.[9] She noted that the burden of proof that the law places on the prosecution in criminal cases, and the high standard of proof in such cases were disadvantageous in the circumstances where law enforcers faced difficulties in gathering

1 Maina W (2019) *State Capture: Inside Kenya's Inability to Fight Corruption* Africa Centre for Open Governance (AfriCOG).

2 United Nations (10 September 2018) "Global Cost of Corruption at Least 5 Per Cent of World Gross Domestic Product, Secretary-General Tells Security Council, Citing World Economic Forum Data", available at https://press.un.org/en/2018/sc13493.doc.htm (visited 24 August 2022).

3 Maina (2019).

4 The Republic of Uganda "The Zero Tolerance to Corruption Policy, 2019".

5 Eye Witness (18 October 2021) "Uganda Loses 20 Trillion to Corruption Annually", available at https://www.eyewitnessug.com/uganda-loses-20tn-to-corruption-annually-igg/ (visited 24 August 2022).

6 The Corruption Index ranks Uganda at 142 out of 180 least corrupt countries.

7 Note the term big fish is used as a proverbial term to mean high ranking officials in government. See Human Rights Watch (2013) "Letting the Big Fish Swim: Failures to Prosecute High-Level Corruption in Uganda".

8 Lumu D (26 May 2022) "Corruption: IGG Kamya Explains why Big Fish Escape Her Net", available at https://www.newvision.co.ug/category/news/corruption-igg-kamya-explains-why-big-fish-es-134830 (visited 26 August 2022).

9 Lumu available at https://www.newvision.co.ug.

evidence.[10] She was therefore hopeful, that in the case of lifestyle audits where the burden of proof was on those being audited to prove the legitimacy of the sources of their wealth, the scales would be favourably tilted to the advantage of the law enforcers.[11] These remarks on shifting of the burden to the accused persons to justify their wealth highlight the potential contravention of the presumption of innocence which obliges the prosecution to carry the burden of proof to the requisite court standard throughout the trial process.[12] Any shifts in the burden or standard can lead to convictions based on insufficient evidence and may thereby compromise the fairness of the respective trial process.[13] Therefore, whereas the significance of lifestyle audits as an anti-corruption tool cannot be contested questions remain on their constitutional validity as will be further elaborated in this paper.

Whereas there is no consensus on the definition of a lifestyle audit, a lifestyle audit could be described as an inquiry into a person's living standards to ascertain consistency with known sources of income.[14] The purpose is to provide clues to probable illegitimate sources of income that may be hidden by those who engage in illegal activity.[15] There are various ways through which the audits are done and this may be through a net worth analysis, surveillance or administration of questionnaires.[16] The analysis of the suspect's net worth involves tracking changes in a person's net worth, which is the difference between their assets and liabilities, and comparing this to their known sources of income to establish if there are any unexplainable discrepancies.[17] The changes in net worth are tracked using accessible closed and open sources of information, and it is necessary that the tracking of changes is limited to a given scope of time.[18] Surveillance involves the use of overt and covert means to gather

10 Lumu available at https://www.newvision.co.ug.
11 Lumu available at https://www.newvision.co.ug.
12 *Ssekitoleko v Uganda* [1967] EA 531.
13 *Ssekitoleko v Uganda* [1967] EA 531.
14 Powell S (2011) "Lifestyle Audits are a Critical Management Tool to Identify Fraud", available at http://documents.lexology.com/ae0e573a-4da1-41e1-9a50-7278870d4796.pdf (visited 25 October 2019).
15 Ngumbi E (2019) "Viability of Lifestyle Audits as an Anti-Corruption Strategy in Kenya: A Critical Assessment of the Policy, Legal and Administrative Framework" LLM Thesis submitted to the School of Law, University of Nairobi, Kenya.
16 Ngumbi E (2019)
17 Coenen TL (2009) *Expert Fraud Investigation* Hoboken, NJ: Wiley at 171 – 172.
18 Dornbierer, A (2021) *Illicit enrichment: A Guide to Laws Targeting Unexplained Wealth* Basel Institute on Governance.

information about someone's affairs and ways of living.[19] The administration of questionnaires involves the suspect volunteering information about their affairs which is then subjected to verification.[20]

Overall, the push for the use of lifestyle audits as an anti-corruption measure appears to be steeped in the theory of rational choice.[21] Under this theory of conceptualising the drivers of corruption, it is presumed that people obey rules that they perceive to be in their best interests; which they consider to be more beneficial or rather less costly to them.[22] It is thought that individuals make a cost-benefit assessment of the consequences of their actions and are motivated by a desire to maximise benefits and minimise costs.[23] Lifestyle audits have been increasingly adopted as anti-corruption measures because, when implemented correctly, they are believed to be a dissuading factor for those who engage in corruption.[24] The recovery of proceeds of corruption, which is often the anticipated end of such audits, is understood to undercut the benefits of wealth accumulation through corrupt or illegal actions. It is then presumed that corruption or crime becomes less appealing for those making rational choices when the proceeds are subject to confiscation and the benefits are diminished.[25] In the South African case of *National Director of Public Prosecutions and Another v Mohamed NO and Others*,[26] Justice Ackermann noted that "it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime".[27] He further explained that the South African legislature had embraced this approach culminating in a protracted process of law reform which sought to ensure that criminals do not benefit from their crimes.[28]

Different countries have adopted different methodologies in the implementation of lifestyle audits. Some such as Kenya and South Africa have enacted a specific Act to guide the

19 Powell (2011).
20 Powell (2011).
21 Sulistiyono A & Handayani IGAKR (2017) "The Recovery of Corruption Assets Through Additional Criminal Penalty of Substitute Money Payment" 1(4) *International Journal of Business, Economics and Law*.
22 Ganti A (2019) "Rational Choice Theory" *Investopedia*, available at https://www.investopedia.com/terms/r/rational-choice-theory.asp (visited 19 October 2022).
23 Riker WH (1995) "The Political Psychology of Rational Choice Theory" 16(1) *Political Psychology* 23 – 44.
24 Riker (1995) 23-44.
25 Riker (1995) 23-44.
26 2002 (4) SA 843 (CC).
27 Para 15.
28 Paras 15 – 16.

implementation, while others chose to fit lifestyle audits into existing legal frameworks.[29] In the practical implementation of lifestyle audits, it is generally recommended that they are employed alongside other related anti-corruption measures such as the criminalisation of illicit enrichment, establishing requirements for regular wealth declarations and providing parameters for enforcement of unexplained wealth orders.[30] Generally, there has been a minimal study on the use of lifestyle audits as an anti-corruption measure, such as their efficacy, benefits and challenges faced during implementation in various countries.[31] In Uganda, there are efforts to develop a new legal framework to guide the implementation of lifestyle audits.[32] However, there are few studies that have interrogated the scope of the legal and policy reforms necessary for lifestyle audits to thrive. Therefore, this paper seeks to provide some insights into the scope of the legal and policy reforms necessary to support the implementation of lifestyle audits in Uganda. This paper highlights that regulatory reforms must focus beyond generating new laws and regulations to guide lifestyle audits. Rather, the reforms should entail making key revisions in the existing legal and policy framework on the criminalisation of illicit enrichment, the requirements for regular wealth declarations and the enforcement of unexplained wealth orders, since lifestyle audits will be employed together with the said anti-corruption measures.

2. THE REQUIREMENT FOR WEALTH DECLARATIONS IN UGANDA: WHERE DO THE PROBLEMS LIE?

Regular wealth declarations are believed to be the bedrock of lifestyle audits and for lifestyle audits to thrive, there must be reliable wealth declaration measures in place.[33] The reliability of wealth declaration measures is dependent on various factors which include the accuracy of declarations, the frequency of declarations, scope of declarations and effective oversight

29 Sihanya B & Ngumbi E (2020) "The Viability of Lifestyle Audits as an Emerging Anti-Corruption Tool in the Public Sector: Concepts, Essentials and Prospects" 4 *JACL* at 80.

30 France G (2021) "Overview of Lifestyle Audits as an Anti-Corruption Tool and Country Examples from Africa".

31 Ngumbi (2019).

32 The Independent (21 October 2022) "IGG Formalizes Lifestyle Audit Legal Framework", available at https://www.independent.co.ug/igg-formalizes-lifestyle-audit-legal-framework/ (visited 21 November 2023).

33 Ngumbi (2019).

mechanisms.[34] In Uganda, previously, only upper and middle cadre public officers or rather those designated as leaders in the second schedule of the Leadership Code Act were required to make declarations.[35] The requirement to have lower cadre public officers declare their wealth was a result of recent legislative amendments in 2017 and 2021.[36] However, the amendments established a declaration interval of five years for lower cadre public officials.[37] The long interval of five years is likely to undermine efforts to counter illicit wealth accumulation among lower cadre public officials, especially in the absence of mechanisms to constantly track fundamental changes in the officials' wealth.[38] It is generally preferable that the intervals between declarations are much shorter for greater effectiveness.[39] Most African countries now have requirements for annual wealth declarations and in Africa, only countries such as Ghana (four years) and Uganda (five years for public officers) seem to be the exception with longer intervals between declarations.[40]

The other legal complication that is likely to arise regarding wealth declarations of public officers is regarding the actual timing of the first set of declarations for the lower cadre officials, which were done in May 2021 following the amendment.[41] They were done when the Inspectorate was not fully constituted, in the absence of a substantively appointed Inspector General of Government.[42] At the time, there was only one Deputy Inspector General of Government in office who presided over the declaration process.[43] The Inspectorate of Government is fully constituted when the Inspector General of Government and the two

34 Chêne M & Kelso C (2008) "African Experience of Asset Declarations" U4 Helpdesk, Transparency International, Bergen, available at http://www. u4. no/helpdesk/helpdesk/query.cfm (visited 11 July 2024).

35 Secs 2 and 3 of the Leadership Code (Amendment) Act, 2021. See also secs 4 and 5 of the Leadership Code (Amendment) Act, 2017.

36 Sec 4A(1) of the Leadership Code Act, 2017.

37 Sec 4A(1)(c) of the Leadership Code Act, 2017.

38 Ngumbi (2019).

39 Gumisiriza P & Mukobi R (2019) "Effectiveness of Anti-Corruption Measures in Uganda" 2(8) *Rule of Law and Anti-Corruption Center Journal* .

40 Sihanya & Ngumbi (2020).

41 Inspectorate of Government (2021) "IG Launches Declaration of Income, Assets and Liabilities for Public Officers", available at https://www.igg.go.ug/updates/news/ig-launches-declaration-of-income-assets-and-liabilities-by-public-officers/ (visited 19 October 2022).

42 New Vision (4 June 2022) "We Cannot Work Without Substantive IGG Says Leadership Code Tribunal", available at https://www.newvision.co.ug/category/family/we-cannot-work-without-substantive-igg-says-l-105254 (visited 19 October 2022).

43 New Vision (4 June 2022) available at https://www.newvision.co.ug.

Deputy Inspector Generals of Government are in office.[44] Accordingly, the legitimacy of the declarations made to the Inspectorate of Government when it was not fully constituted could be legally contested. In the case of *Hon Sam Kuteesa and 2 Others v Attorney General*,[45] the court held that powers vested in the Inspectorate of Government as a composite entity were not vested in the Inspector General of Government or the Deputies and could only be invoked when the Inspectorate was fully constituted. The court quashed prosecutions which the then Deputy Inspector General of Government had instituted when the Inspectorate was not fully constituted.

Furthermore, there are concerns over the capacity gaps and resource constraints that limit the Inspectorate of Government to comprehensively verify declarations made so as to effectively check their accuracy and enforce adherence.[46] These capacity gaps which include investigation skill deficiencies and personnel shortages are still reportedly in existence[47] and have prompted questions on whether the Inspectorate of Government should embark on lifestyle audits in the absence of any significant improvement in the human resource capacity of the institution. There are also concerns that lifestyle audits may further strain the rather limited financial resource envelope of the institution and some commentators have expressed doubts about the capability of the Inspectorate of Government to effectively undertake lifestyle audits with such inadequate resources.[48]

The other conundrum with the wealth declarations in Uganda is with the provisions on public disclosure of wealth information and the questions on the constitutional validity of those provisions in light of the privacy rights of citizens. To examine this problem, reference must be made to the constitutional roots of the Leadership Code of Conduct. During the constitution-making process, it was proposed that the Constitution make provision for the Leadership Code of Conduct.[49] However, the Constitutional Review Commission resolved that

44 Art 223(1) and (2) of the Constitution of the Republic of Uganda, 1995.
45 General Constitutional Petition 46 of 2011 & Constitutional Reference 54 of 2011 (unreported).
46 The Independent (22 February 2022) "IGG lacks funds to verify wealth declaration: Deputy IGG", available at https://www.independent.co.ug/igg-lacks-funds-to-verify-wealth-declarations-deputy-igg/ (visited 20 October 2022).
47 Inspectorate of Government (2021) "Bi-Annual Inspectorate of Government Performance Report to Parliament January to June 2021".
48 NTV Uganda (2021) "Kickstarter: Will Lifestyle Audits Bury Corruption in Uganda?", available at https://www.youtube.com/watch?v=CFMLCFvI4UM (visited 19 October 2022).
49 Uganda Constitutional Review Commission Report, 1995, para 20.78.

other than having all provisions regarding the Leadership Code of Conduct in the Constitution, the Constitution would only entail a few guiding provisions and Parliament was to enact ordinary legislation for the more detailed provisions.[50] The Leadership Code Act Cap 168, which predated the Constitution, having been enacted in 1992, provided that declaration statements were to be discreet and only accessible to the Leadership Code Committee (subsequently replaced with the Leadership Code Tribunal) when adjudicating breaches of the code, Inspectorate of Government for purposes of enforcement, the Office of the Auditor General and the Uganda Police.[51]

At the time of enacting the Constitution in 1995, there were propositions for public disclosure of wealth declarations.[52] However, the Constitutional Review Commission rejected the proposals for public disclosure of wealth declarations as being an unwarranted intrusion on the privacy rights of citizens. This was premised on the reasoning that public disclosure would prejudice the rights of honest public officials whose private information would unduly get into the public domain even in the absence of any wrongdoing on their part.[53] The Commission was of the view that in case of any doubts concerning any public official's wealth, members of the public were at liberty to report to the law enforcers who were mandated to get access to this private information. The law enforcers could then interrogate the matter and discipline the respective officials where there was sufficient evidence to support the allegations against them.[54]

Interestingly, in the 2002 enactment, the Act allowed public disclosure of wealth declarations but with no detailed provisions for the parameters of the public disclosure.[55] The 2017 amendment of the Act made provision for the parameters and provided that officials would be informed after their information had already been divulged to the public.[56] The disclosure was preconditioned on commitments to keep the information disclosed confidential by those granted access and restricted to circumstances where the disclosure

50 Uganda Constitutional Review Commission Report, 1995, para 20.78.
51 Sec 7 of the Leadership Code Act, Cap 168.
52 Uganda Constitutional Review Commission Report, 1995, para 20.103.
53 Uganda Constitutional Review Commission Report, 1995, para 20.103.
54 Uganda Constitutional Review Commission Report, 1995, para 20.103.
55 Sec 7 of the Leadership Code Act, 2002.
56 Sec 6 of the Leadership Code (Amendment) Act, 2017.

would benefit law enforcement.[57] Whereas the Act tried to provide safeguards, some problems are likely to arise especially in regards to the mandate of the Inspectorate of Government, as the custodian of this private information. Ideally, the Inspectorate of Government should not be allowed extensive discretionary power to decide when to divulge this information. As noted in the case of Lukyamuzi, the institutional set-up of the Inspectorate in some instances breaches the principle of *nemo judex in causa sua* (no person shall be a judge in his or her own cause).[58]

This could be another example where the Inspectorate of Government is a judge in its own cause. It receives declarations, assesses the requests and adjudicates on whether access should be granted.[59] This entails several roles rolled into one. The amendments in 2021 attempted to remedy this situation by allowing those aggrieved by a refusal to grant the information to appeal to the Leadership Code Tribunal.[60] However, this is only a part remedy applicable to the members of the public who may wish to challenge a refusal to grant access. Nevertheless, the Inspectorate of Government still retains extensive discretionary powers to grant access and the law has no provision for administrative interventions where a public official is aggrieved by the Inspectorate of Government's grant of access to their declarations. This extensive discretion seems to be incompatible with the intention of the framers of the Constitution, who considered public disclosure of wealth declarations to be an unwarranted intrusion on the privacy of public officials.

In other jurisdictions, there appears to be an acceptance of public disclosure of wealth declarations. In *Wypych v Poland*[61] the European Court of Human Rights rejected the complaint of a local council member in Poland who refused to submit his asset declaration claiming that the legislative obligation to disclose details concerning his financial situation and property portfolio and the online publication of the information disclosed was in breach of his privacy rights. The Court found that online publication of declarations was indeed an interference with the right to privacy. However, the court further reasoned that the publication was justified since it enabled transparency of the local political process with the

57 Sec 6 of the Leadership Code (Amendment) Act, 2017.
58 *Lukyamuzi v Attorney General* Electoral Commission Constitutional Appeal 2 of 2007.
59 *Lukyamuzi v Attorney General* Electoral Commission Constitutional Appeal 2 of 2007.
60 Sec 9 of the Leadership Code (Amendment) Act, 2021.
61 The European Court of Human Rights (Fourth Section) Application No 2428/05.

voters able to easily access information on their local political leaders and use it to bring them to account for their actions. The court seemed to rely on the access to information rights of citizens as having precedence over the privacy rights of local political leaders. In *Sean Tembo v Electoral Commission of Zambia and Attorney General*,[62] the petitioner challenged the non-disclosure of assets and liabilities of the victorious presidential candidate as being unconstitutional since it was a requirement of the Constitution that presidential candidates declare their assets and liabilities in the prescribed form and also allowed public access to the same. The court held that the purpose of publishing information was to furnish voters with pertinent information on their candidates to enable them to make more informed decisions while voting and therefore the information should have been made publicly available.

However, the facts of these court decisions should be contrasted with the reality of wealth declarations in Uganda. The said decisions seem to justify public disclosure of assets for leaders on the premise of promoting democratic accountability. Both decisions dealt with incidents of political leaders. However, the declaration system currently in Uganda combines wealth declarations for political leaders and other public officials whose assumption of duty or stay in office is not determined by a popular vote.[63] The plausibility of using these foreign court decisions to justify public disclosure of wealth declarations, especially in the context of public officials who are not political leaders, and whose stay in office is not determined by a popular vote remains disputable.

3. THE CRIMINALISATION OF ILLICIT ENRICHMENT AND CONVICTION-BASED FORFEITURE: A DETAILED DISCOURSE

Section 31(1) and (2) of the Anti-Corruption Act, 2009 provides that:

> (1)The Inspector General of Government or the Director of Public Prosecutions or an authorised officer, may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person—(a) maintains a standard of living above that which is commensurate with his or her current or past known sources of income or assets; or (b) *is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or assets*.

62 HP 502 of 2021.

63 Secs 4 and 4A of the Leadership Code Act, 2002.

> (2) *A person found in possession of illicitly acquired pecuniary resources or property commits an offence* and is liable on conviction to a term of imprisonment not exceeding ten years or a fine not exceeding two hundred and forty currency points or both.

The drafting of this section has led to confusion and inconsistent court interpretations. In the case of *Uganda v Wandera*,[64] the High Court held that to prove the offence of illicit enrichment the prosecution must be able to link the disproportionate wealth one possesses to the unlawful acts of the accused. However, in *Kazinda v Uganda*,[65] the Court of Appeal held that the prosecution does not have to link the suspects' unlawful acts to their disproportionate wealth. The reasoning was that what the law criminalised was the control or possession of disproportionate wealth.[66] The court then stated quite strangely that the control or possession of disproportionate wealth was tantamount to illicit acquisition and delved into what appeared to be an equivocal definition of the word illicit.[67] However, the efforts to define the meaning of the word illicit were an exercise in futility. The Merriam-Webster dictionary defines the word illicit to mean not permitted or rather unlawful.[68] The Cambridge Dictionary also defines illicit to mean illegal or disapproved by society.[69] It is therefore evident that the ordinary literal and grammatical meaning of the word illicit connotes illegality or unlawfulness and words of a statute must be interpreted according to their literal and grammatical meaning where they are unambiguous.[70]

On the contrary, the ambiguity in this section is largely attributed to poor drafting. A wholesome reading of both sub-sections (1) and (2) of section 31 indicates that the mutual intention of these legal provisions was not to criminalise the *illicit acquisition of wealth*. Rather, the section sought to criminalize the possession or control of wealth or the maintaining of a standard of living that was incommensurate to one's known sources of income.[71] Subsection 2 could have been rephrased to eliminate ambiguity, using language

64 HCT-00-AC-SC-0012/2014.
65 Court of Appeal CRIMINAL APPEALS I79 OF 2O2O AND 208 OF 2O2O.
66 Court of Appeal CRIMINAL APPEALS I79 OF 2O2O AND 208 OF 2O2O.
67 Court of Appeal CRIMINAL APPEALS I79 OF 2O2O AND 208 OF 2O2O.
68 Mariam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/illicit (visited 20 October 2022).
69 Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/english/illicit (visited 20 October 2022).
70 *Hon. Theodore Ssekikubo and Others v Attorney General* Constitutional Appeal 1 of 2015.
71 Sec 31 (1) and (2) of the Anti- Corruption Act, 2009.

similar to subsection 1, such as: "a person found in possession of pecuniary resources or property or maintaining a standard of living which is disproportionate to their current or past known sources of income commits an offence" rather than as it now reads "a person *found in possession of illicitly acquired* pecuniary resources or property commits an offence".[72] Irrespective of the equivocation in the appropriation of meaning to the word illicit and the strange observation that the possession of disproportionate wealth was what constituted the illicit acquisition, the Court of Appeal arrived at what can be considered as the rightful legal position that in proving the commission of the offence of illicit enrichment, the prosecution was not obligated to link the possession of disproportionate wealth to any unlawful acts.[73]

The fact that the prosecution is not required to link the possession of disproportionate wealth to any unlawful acts is what distinguishes illicit enrichment laws from confiscation laws.[74] Dornbierer clarifies this distinction and says confiscation laws, unlike illicit enrichment laws, generally require the state to prove the existence of underlying or separate criminal activity and/or the criminal origin of assets, to the requisite court standard.[75] Therefore, the conflation of illicit enrichment and confiscation laws may cause legal misapprehensions that are likely to prejudice the rights of those subject to the criminal justice processes, as was the case in the Kazinda illicit enrichment trial, especially with the resultant confiscation punishment that the High Court appropriated.[76]

In the Anti-Corruption Act, the offence of illicit enrichment is created in section 31(2). Confiscation orders are provided for in sections 63 and 64 of the same Act. Before the 2015 amendment, the Anti-Corruption Act provided for confiscation orders as an additional punishment that would be imposed where a given property was the subject of or derived from an act of corruption.[77] Therefore the law seems to have predicated confiscation orders on acts of corruption. If the rule of lenity that requires strict construction of ambiguities in penal statutes were to be applied, it would be arguable that confiscation orders did not apply to the offence of illicit enrichment since proof of the offence of illicit enrichment was not

72 Sec 31 (1) and (2) of the Anti- Corruption Act, 2009.
73 *Kazinda v Uganda*.
74 Dornbierer (2021).
75 Dornbierer (2021).
76 *Uganda v Geoffrey Kazinda* (Session Case HCT-AC/CO 4 of 2016) [2020].
77 Sec 63 of the Anti-Corruption Act, 2009.

predicated on any particular acts of corruption.[78] This interpretation of the law means that convictions of illicit enrichment could be sustained without being predicated on acts of corruption. In contrast the punishment of confiscation cannot be sustained without any linkage to the acts of corruption. This would then render the punishment of confiscation inapplicable to cases of illicit enrichment, which does not require predication on acts of corruption.[79] This could also probably be the reason that eventually prompted parliament in the recent amendment of the Act, to restrict the confiscation punishment to the offence of corruption which is the only offence in the Act that spells out various acts that constitute the crime of corruption.[80]

Interestingly, in the contested trial, Kazinda was not charged with the offence of corruption but rather several counts of illicit enrichment and was convicted without the prosecution linking his disproportionate wealth to given acts of corruption or even proving the same beyond reasonable doubt.[81] Therefore invoking confiscation orders which were predicated on acts of corruption during sentencing when the charges preferred and subsequent conviction was for illicit enrichment was prejudicial to Kazinda's right not to be subjected to severer punishment than that which is due for the crime committed.[82] The punishment that he was given for the offence should have been restricted to what was provided for under section 31 of the Anti-Corruption Act, which was imprisonment for a maximum of ten years or a fine not exceeding 40 currency points or both. Unfortunately, while appealing the decision of the trial court Kazinda did not raise this issue and the Court of Appeal did not adjudicate on the issue.

The counter-argument may be that the Trial on Indictments Act[83] gave the court the discretion to make confiscation orders in criminal matters based on the circumstances of each case. However, the Trial on Indictments Act subjects that discretion to any special provisions regarding forfeiture or confiscation in the respective law under which the person is charged and convicted, in this case, the Anti-Corruption Act.[84] Therefore court was bound to follow

78 *Uganda v Abdala Nabil* Criminal Case 4 of 2016.
79 Sec 2 of the Anti- Corruption Act, 2009.
80 Secs 6 and 7 of the Anti-Corruption (Amendment) Act, 2015.
81 *Uganda v Geoffrey Kazinda*.
82 Art 28(8) of the Constitution of the Republic of Uganda, 1995.
83 Sec 131(1) and (4) of the Trial on Indictments Act Cap 23.
84 Secs 131(1) and (4) of the Trial on Indictments Act Cap 23.

the relevant provisions of the Anti-Corruption Act on confiscation when appropriating punishment and had no latitude to appropriate a punishment for the offence when it was not applicable.

Another critique of the appeal judgment could provide that the confiscation orders made for Kazinda's property amounted to double jeopardy. Although a similar argument was made in Kazinda's appeal, the appellant did not fully expound the argument and it is not surprising that the court rejected the argument.[85] The Court of Appeal relied on the decision of the Constitutional Court which held that Kazinda's trial for illicit enrichment did not amount to double jeopardy.[86] The reason for the Constitutional Court decision was that the illicit enrichment offence was unique in character and nature from the other corruption offences for which Kazinda had been convicted or acquitted in previous prosecutions.[87] However, the Court of Appeal failed to take cognisance of the fact that at the time of the Constitutional Court decision, the illicit enrichment charges had been preferred but the trial had not been concluded and the Constitutional Court could not have speculated and anticipated that one of the punishments for the offence of illicit enrichment, would eventually be the confiscation of Kazinda's property.

In a nutshell, if Kazinda's conviction had been restricted to the offence of illicit enrichment, proof of which was detached from underlying acts of corruption, questions of double jeopardy could have been avoided altogether and no wonder the constitutional court readily allowed the prosecution for illicit enrichment to proceed.[88] However, the imposition of the confiscation punishment upon conviction significantly altered the context of the trial as the confiscation orders derived their legality from linking the disproportionate property to underlying acts of corruption for which he had been previously tried or should have been tried in the previous multiple trials.[89]

Regardless, the confiscation laws that were the basis of the confiscation orders in Kazinda's trial for illicit enrichment, have since been amended restricting the applicability of the confiscation punishment to the offence of corruption and providing for a more elaborate

85 N 65.
86 *Geoffrey Kazinda v Attorney General* Constitutional Petition 30 of 2014.
87 *Geoffrey Kazinda v Attorney General* Constitutional Petition 30 of 2014.
88 *Geoffrey Kazinda v Attorney General* Constitutional Petition 30 of 2014.
89 Art 28(9) of the Constitution of the Republic of Uganda, 1995.

procedure for confiscation.[90] The Inspector General of Government or the Director of Public Prosecutions have to initiate the confiscation proceedings by applying for an order of the court to make assessments for the value of the benefit a convict has derived from corruption within 6 months following a conviction.[91] The Act provides that where the court is satisfied that the convict derived a benefit from corruption, the court will make an assessment order directing the convict to pay the amount stated in the assessment within six months. Then upon failure to pay the amount, the court may proceed with confiscation.[92] However, the Act has problematic provisions which stipulate that all property acquired ten years before conviction is presumed to be a proceed or benefit derived from corruption.[93] The presumption is rebuttable on the balance of probabilities and the burden to rebut the presumption lies on the accused.[94] These provisions impose a legal burden on the accused to prove that their property, acquired ten years prior to a conviction, is not a proceed of crime.

Where any criminal offence imposes a legal burden of proof on the accused, it is generally considered to infringe on their right to be presumed innocent.[95] In *State v Gwadiso*,[96] the accused was convicted of dealing in dagga contrary to section 21(l)(a)(i) of the Drugs and Drug Trafficking Act.[97] The section provided that, where an accused was found in possession of a quantity of dagga more than 115g, it would be presumed, *until the contrary is proved,* that the accused was guilty of dealing in dagga. The court held that the section was a reverse onus provision and had the effect of shifting the burden of proof to the accused.[98] The court reasoned that the effect of the provision was that, once the prosecution had proved possession of an amount of dagga more than 115g, the accused would on the balance of probabilities have to rebut the presumption that such possession constituted dealing. Even in the circumstances where the accused had raised a reasonable doubt concerning their

90 Long title of the Anti-Corruption (Amendment) Act, 2015.
91 Sec 6 of the Anti-Corruption (Amendment) Act, 2015.
92 Sec 8 of the Anti-Corruption (Amendment) Act, 2015.
93 Sec 7 of the Anti-Corruption (Amendment) Act, 2015.
94 Sec 7 of the Anti-Corruption (Amendment) Act, 2015.
95 *State v Gwadiso* CCT11/95 [1995] ZACC 11, the court explained that a legal burden requires an accused to demonstrate their innocence in the matter on the balance of probabilities in order to be acquitted of that offence while an evidential burden obligates the accused to adduce evidence which raises a reasonable doubt regarding their guilt of an offence charged.
96 *State v Gwadiso* CCT11/95 [1995] ZACC 11.
97 The Drugs and Drugs Trafficking Act, 140 of 1992.
98 *State v Gwadiso*.

culpability for dealing in dagga, but failed to rebut the presumption of dealing on a balance of probabilities, a conviction would still stand. The court concluded that the effect of the provision was that it imposed the legal burden of proof on the accused, and one could be convicted for the offence despite the existence of a reasonable doubt as to one's guilt.[99]

In the present context, the Anti-Corruption Act creates a rebuttable presumption that all property acquired ten years before conviction is a proceed of corruption.[100] It then places on the accused the burden to disprove the presumption on the balance of probabilities. This implies that even where the prosecution cannot prove beyond reasonable doubt that a given property is proceeds of corruption, the property may still be subject to confiscation, as long as the presumption is not rebutted on the balance of probabilities. It may be argued on the contrary that since the person whose property is a subject of confiscation is already a convict, the presumption of innocence is only applicable up to the point of their conviction. However, a fair trial process would require the prosecution to prove all elements beyond a reasonable doubt, even those that imply the eventual punishment for the offence.[101] Dornbierer also highlights that generally confiscation laws require the state to prove the criminal origin of disproportionate assets to the requisite court standard.[102]

The confiscation orders when undertaken, affect the property rights of the accused, and the position in the legislation may encourage the state to arbitrarily deprive convicts of their lawfully acquired property. In *Damian Akankwasa v Attorney General*,[103] the Constitutional Court held that article 26 of the Constitution which makes provision for property rights could not be invoked to protect property which had been unlawfully acquired. The Constitutional Review Commission also opined that laws making provision for confiscation of unlawfully acquired property do not encourage the arbitrary deprivation of property.[104] However, in the South African case of *NDPP v RO Cook*,[105] the court held that a deprivation of property may be arbitrary when the respective statute does not provide sufficient reason for the deprivation or is procedurally unfair. Therefore, the Anti-Corruption Act provisions which

99 Paras 15 – 19.
100 Sec 7 of the Anti-Corruption (Amendment) Act, 2015.
101 Art 28(3)(a) of the Constitution of the Republic of Uganda, 1995.
102 Dornbierer (2021).
103 Constitutional Petition 5 of 2011.
104 Uganda Constitutional Review Commission Report, 1995, para 20.60.
105 (260/03) [2004] ZASCA 36, para 15.

unreasonably taint all the property of a convict acquired in the ten years preceding their conviction, and which in effect creates a reverse onus on the accused to rebut the presumption, should be regarded as procedurally unfair. Consequently, the constitutional validity of those provisions should be questioned.

4. TOWARDS UNEXPLAINED WEALTH ORDERS: EXPLORING THE WAY FORWARD

Overall, the legal challenges with conviction-based forfeiture especially under the existing legal and policy framework may be remedied by two possible alternatives which will be discussed briefly. One there should be provisions for civil forfeiture, alternatively known as unexplained wealth orders, under the law. Given the complexities that the prosecution is faced with in conviction-based forfeiture in light of the rights of the accused regarding the presumption of innocence and their property rights, unexplained wealth orders may be more legally defensible in the circumstances.[106] Traditionally civil forfeiture is considered to be an action in rem.[107] An action in rem targets tainted property rather than the individual and may be less challenged regarding the infringement on the rights of individuals. Unfortunately, Uganda has yet to enact a law on civil forfeiture.[108] During the amendment of the Anti-Corruption Act, the initial draft contained provisions on civil forfeiture.[109] However, these provisions were removed from the Act that was eventually passed, because the Act could not contain both criminal and civil sanctions.[110] It was also considered prudent to include civil forfeiture for illicitly acquired assets in comprehensive legislation, applicable to all relevant criminal offences, and not only corruption.[111]

The Inspectorate of Government should explore options of administrative forfeiture through the Leadership Code Tribunal. The Leadership Code Act provides for the confiscation of undeclared property where there is evidence that the property was derived from unlawful

106 Bogere P (2014) "Civil Recovery of Corruptly Acquired Assets in Uganda" LLM dissertation, University of the Western Cape.
107 Bogere (2014).
108 Bogere (2014).
109 Parliament of Uganda (2014) "Report on Sectoral Committee on Legal and Parliamentary on the Anti-Corruption Bill 2013".
110 Parliament of Uganda (2014) "Report on Sectoral Committee on Legal and Parliamentary on the Anti-Corruption Bill 2013".
111 Parliament of Uganda (2014) "Report on Sectoral Committee on Legal and Parliamentary on the Anti-Corruption Bill 2013".

acts.[112] Even though the forfeiture under the Leadership Code Act is also predicated on unlawful acts, sanctions for breaches of the Act are considered to be administrative and not criminal, and may not be challenged on matters of presumption of innocence.[113] There is also less formality in the tribunal procedures.[114] Therefore, forfeiture proceedings may be more constitutionally justifiable in the Tribunal than they presently are in the Anti-Corruption Court.

In light of the foregoing discussion, it is clear that as the government moves to establish a legal framework to guide the implementation of lifestyle audits, the government must make some critical legal and policy interventions to align some key issues about wealth declarations, illicit enrichment and unexplained wealth orders in Uganda. This paper recommends the alignment and harmonisation of related legislation in the following ways.

i. Amendments should be made to the relevant laws to address the legal challenges that arise when the Inspectorate of Government is not fully constituted especially in the context of the wealth declaration process.

ii The law and policymakers should expedite the enactment of civil forfeiture laws to be an alternative to conviction-based forfeiture laws. In the meantime, the Inspectorate of Government should explore administrative asset forfeiture through the leadership code tribunal since it may have fewer constitutional challenges pursuing that route. Furthermore, revisions in the conviction-based forfeiture laws should also be explored.

iii Given the rights of individuals that are at stake in public disclosure of declarations, access to declarations may be allowed but the law should be revised so that this can only be granted or refused by the Leadership Code Tribunal. Further, provisions to appeal to the courts of law for redress for anyone aggrieved by the grant or refusal may be incorporated into the law.

112 Sec35 of the Leadership Code Act, 2002.
113 Bogere (2014).
114 Sec19S Leadership Code Act, 2002.

iv The Inspectorate of Government should address the skills and resource gaps that exist in the institution as it moves towards implementing lifestyle audits.

5. CONCLUSION

This paper exhibits that while lifestyle audits can be a valuable tool in anti-corruption efforts, their implementation requires careful consideration to protect individual rights and freedoms. It further emphasises the need for complementary anti-corruption measures, including the criminalisation of illicit enrichment, reliable wealth declarations, and enforcement of unexplained wealth orders, to support implementation of lifestyles audits. Therefore, the paper proposes that the scope of the legal and policy reforms necessary to support the effective implementation of lifestyle must incorporate key revisions in the existing legal and policy framework on the complementary anti-corruption measures.